In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957.

No. 671

Petitioner,

vs.

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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In the Supreme Court
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No. 671

DAVE SCHNEIDER, doing business as Dave Schneider Wholesale Jewelry,
Petitioner,

vs.

CENTENNIAL INSURANCE COMPANY, a corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Ninth Circuit.

There are two reasons why certiorari should be denied in this case: (1) petitioner has not shown any special or important reason that would justify consideration of the case by this court and (2) the decision below is right and justice was done.

In fact, were it not for the personalities which petitioner has injected into the case and the unsupported charges which he has made, we would not have filed this brief at all and would have been content to let the opinion of the Court of Appeals speak for itself.

But we must answer the personalities and the unsupported charges of unfair dealing and dishonesty and we would like to do so even before we answer any contention on the merits.

Centennial Insurance Company is a wholly owned subsidiary of the Atlantic Mutual Insurance Company, an insurance company which was organized in 1842 and which is proud of its record over the following 115 years. Like its parent company, respondent pays without litigation the losses which it has undertaken to pay and, like its parent company, it very much resents the charge that it victimizes its policy holders.

Without any reference to or support in the record petitioner also contends that, unlike policies of automobile or fire insurance, the policy involved in this case was a non-standard and hybrid form of policy which was drafted so as "to afford the least protection to the insured by the inclusion of the most exceptions and the most ambiguity".

In fact, however (and we regret that we ourselves must go outside the record), the policy involved in this case is a standard and uniform jewelers' block policy which is used throughout the United States not only by respondent but by the insurance industry in general.

STATEMENT OF THE CASE.

We have no quarrel with petitioner's statement of the case except in the following particulars:

(1) Petitioner fails to mention (the opinion of the Court of Appeals of course makes that point clear) that neither he nor Mr. Stelzer had a clear view of the back of petitioner's automobile while they were talking to each other and inspecting the Stelzer automobile.

(2) Petitioner states that it has been conceded that his jewelry was stolen. While this probably makes little difference, we would rather say that, as far as respondent is concerned, it has been assumed that the jewelry was stolen.

(3) Petitioner makes no mention of clause 5(M) of the policy which excluded unexplained losses and mysterious disappearances.[1] The Court of Appeals found it unnecessary to rely upon that clause in reversing the judgment but it is apparent that it would in any event have precluded any recovery on his part.

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[1]The entire clause provides as follows:

"5. This policy insures against all risks of loss of or damage to the above described property arising from any cause whatsoever except:

* * *

"(M) Unexplained loss, mysterious disappearance or loss or shortage disclosed on taking inventory. Nor shall this policy cover any shortage in goods claimed to have been forwarded in a package when the package is received by the consignee in apparent good order with seals unbroken; nor for loss of or damage to goods when sent 'C.O.D.' with the privilege of inspection by the consignee before delivery."

ARGUMENT.

As far as the merits of the case are concerned, petitioner contends first that clause 5(1) which excludes "loss or damage to property . . . while in or upon any automobile" does not apply to a theft from an automobile.

Petitioner relies upon the rule which is indeed well settled in California (as it is everywhere else) that exceptions in an insurance policy must be construed strictly against the insurer and liberally in favor of the insured and that, as between two reasonable constructions of such a policy, the one which is the most favorable to the insured must be adopted.

It is of course our position that the automobile clause contains no ambiguity and that it can and must be construed in only one way, namely, so as to exclude the type of loss which occurred in this case. Even if it were ambiguous, however, it is clear that the strained construction urged by petitioner could not be adopted.

The very California cases cited by petitioner make it clear that it is only a *reasonable* doubt which is resolved in favor of the insured. In this case, the automobile clause is *not* reasonably capable of the strained construction which he urges.

Petitioner next contends that the judgment of the District Court should have been affirmed because, under the policy, the burden was upon respondent to

prove that the loss did not occur while he was in or upon his automobile.

The point is, however, that consideration of the issue as to the burden of proof was altogether unnecessary to a determination of the case and that of course is why the Court of Appeals did not reach that issue. A review of the evidence convinced it that, regardless of who had the burden of proof, the loss could not possibly have happened under the circumstances under which petitioner assumes that it must have happened. In other words, the Court of Appeals rejected his testimony as inherently incredible and accordingly concluded (1) that he must have been away from his automobile when the loss occurred and (2) that the findings of the trial judge which purported to rely on his testimony were "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Convinced, as it was, that a mistake had been committed by the trial judge, the Court of Appeals was required to reverse the judgment (*United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L. ed. 746).

Its decision is of course strengthened by the fact that unexplained losses and mysterious disappearances are excluded under another clause of the policy. It is also supported by *Bliss Ring Company v. Globe and Rutgers Fire Ins. Co.*, 7 Ill. App. 2d 523, 129 N.E. 2d 784, a case in which the court rejected as similarly incredible similar testimony by the insured.

Petitioner claims that the Court of Appeals selected from the record only those facts which would support its conclusion, omitted to consider other material facts and incorrectly stated the facts which it did state. As this court will note, however, petitioner does not otherwise indicate which particular facts he has in mind.

CONCLUSION.

In the leading case on the subject, *Ruvelson v. St. Paul Fire & Marine Ins. Co.*, 235 Minn. 243, 50 NW 2d 629, the court described the purpose of the automobile clause in a jewelers' block policy as follows:

> ". . . it is difficult to conceive of a more effective deterrent to a potential thief than the presence of someone *in or upon* an automobile. It is extremely unlikely that an attempt would be made to steal from an automobile under these circumstances, and that is no doubt the very thing that the insurer had in mind in requiring actual presence in or upon the automobile (50 N.W. 2d at 635)."

Considering that such a policy covers easily stolen merchandise of high value and is issued to a policy holder who is a target for thieves, it is not surprising that the insurance company should be willing to pay only for losses which occur while the insured (or his representative) is in or upon the automobile.

It is clear that, in this case, justice was done in the court below and that no reason exists why certiorari should be granted.

For the foregoing reasons the petition for the writ should be denied.

Dated, San Francisco, California,
January 10, 1958.

Respectfully submitted,
GEORGE H. HAUERKEN,
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HAUERKEN, ST. CLAIR & VIADRO,
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